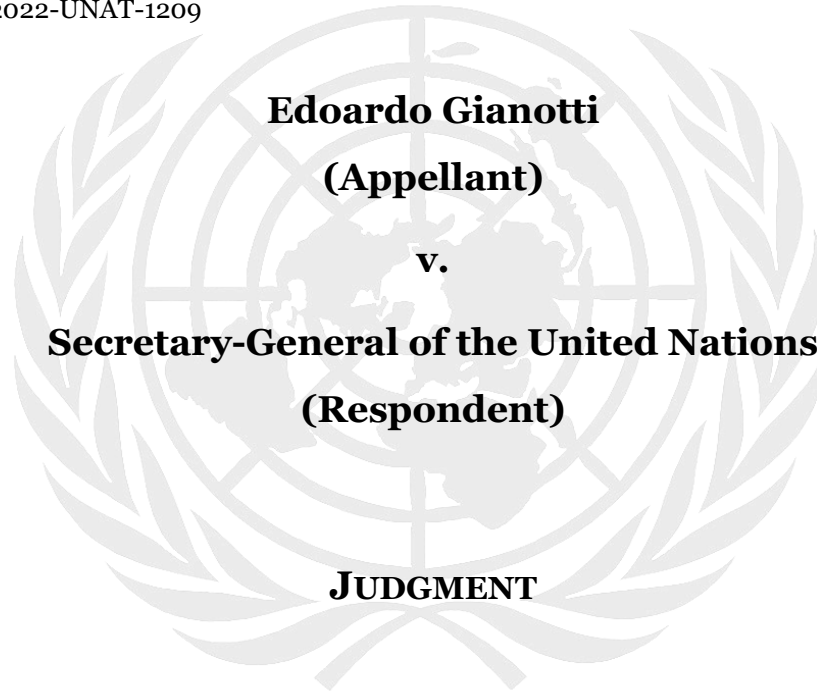




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1209



Edoardo Gianotti

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Graeme Colgan Judge Martha Halfeld
Case No.:	2021-1540
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Appellant: George G. Irving

Counsel for Respondent: Francisca Lagos Pola

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Edoardo Gianotti (Appellant), a staff member who previously served as a Mechanical Engineer at the P-3 level with the United Nations Economic Commission for Europe (UNECE), challenged the alleged decision of the UNECE Executive Secretary to reject his successful candidacy for the post of Economics Affairs Officer at the P-4 level (P-4 Post), after he was recommended by the Hiring Manager and endorsed by the Central Review Board (CRB).

2. In Judgment No. UNDT/2021/013,¹ the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) dismissed Mr. Gianotti's application on the basis that it was not receivable *ratione materiae*. The Dispute Tribunal held that the recruitment process for the P-4 Post had not yet concluded, and in the absence of a final selection decision, the application was not receivable. The Appellant appeals before the United Nations Appeals Tribunal (Appeals Tribunal or UNAT). After the appeal had been fully briefed, the Secretary-General sought leave to present additional evidence showing that the Appellant was ultimately selected for P-4 Post.² Consequently, the Secretary-General also argues that the Appellant's request for relief has become moot because of his selection for the post.

3. For the reasons set out below, we agree and dismiss the appeal.

Facts and Procedure

4. On 1 September 2006, the Appellant joined UNECE as a Mechanical Engineer in the Sustainable Transport Division, Vehicle Regulations and Transport Innovations Section, at the P-3 level.

5. On 29 November 2019, UNECE issued Job Opening No. 123535 for the P-4 Post, which was an Economics Affairs Officer position in the Sustainable Transport Division. Prior to the issuance of the Job Opening, the Director of the Sustainable Transport Division strongly encouraged female candidates to apply to the P-4 Post during the 179th session of the World Forum for Harmonization of Vehicle Regulations. On 2 December 2019, the Hiring Manager of the Sustainable Transport Division also circulated an e-mail to some 1,642 delegates who were present

¹ *Gianotti v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/013 dated 26 February 2021 (Impugned Judgment).

² See *Edoardo Gianotti v. Secretary-General of the United Nations*, Order No. 431 (2021).

at the World Forum for Harmonization of Vehicle Regulations and strongly encouraged women to apply to the post in furtherance of achieving the goal of 50/50 gender balance in UNECE staff.

6. The Appellant applied to the P-4 Post on 19 December 2019. There was a total of 33 candidates, ten of which were female.

7. On 30 January 2020, the Hiring Manager recommended the Appellant, as he was the only rostered candidate meeting all the requirements of the post. In his recommendation to the UNECE Executive Secretary, the Hiring Manager said:

[The Appellant] meets all required and desirable criteria for the post. He has been working in the Vehicle Regulation and Transport Innovation for more than 14 years at P3 level performing similar functions as those required for the position.

This P4 post has been frozen since June 2019 and on several occasion Member States have expressed their concern about this vacant post. Therefore, in view of the pressing demand for selection of a candidate for this important position, the immediate filling of this P4 post would deem necessary.

8. The Executive Secretary did not approve the recommendation and asked the Hiring Manager to proceed with a full recruitment process that was open to both internal and external candidates.

9. Of the 33 candidates who applied for the post, one withdrew and after further screening, 15 were shortlisted and invited to take part in a 10-minute multiple-choice question test related to the job. Four candidates, including one woman, passed the multiple-choice test and were invited to a second one-hour written essay that was designed to evaluate the candidates' knowledge on vehicle regulations. These were double-blinded tests with no candidate names, and a score of 60 was predetermined to be passing. Of the four candidates, only two passed: the Appellant and another male candidate, who subsequently declined to proceed with his application and decided to withdraw. As such, only the Appellant was invited to the competency-based-interview (CBI), where he succeeded in demonstrating that he met all the required competencies of the job.

10. The Hiring Manager, on 10 June 2020, transmitted a second recommendation to the Executive Secretary, submitting the name of only the Appellant. The Executive Secretary did not approve the recommendation of the Appellant for a second time and asked the Hiring Manager to "provide at least 1 woman candidate".

11. Upon inquiry on 16 June 2020, the Appellant found out that the recommendation for his candidacy was not approved. He submitted a request for management evaluation of the Executive Secretary's decision to reject his successful candidacy for the P-4 Post, after he was recommended by the Hiring Manager and endorsed by the CRB (Contested Decision).

12. The Management Evaluation Unit (MEU) responded to the Appellant on 1 September 2020 informing him that his request was not receivable because there was no final outcome in the selection process.

13. The Appellant filed an application with the UNDT on 24 September 2020 challenging the Contested Decision.

The UNDT Judgment

14. Prior to issuing its Judgment, the UNDT on 4 February 2021 issued Order No. 24 (GVA/2021) to receive an update on the selection process.³ The Secretary-General (Respondent) conveyed the following to the tribunal:

The Respondent hereby informs the Tribunal that no final decision has been taken and that the selection process is *de facto* suspended. The Respondent also elected not to cancel the Job Opening given the current Application.

15. On 26 February 2021, the UNDT issued the Impugned Judgment, finding that the application was premature given that the selection process for the post had not yet concluded. In its decision, the UNDT explained:⁴

In the present case, the recruitment process for the post is not completed and has therefore not resulted in a final selection decision. The record shows that while the recommendation for the Applicant's selection has been rejected on two separate occasions, as described above, there is no evidence that he has been excluded from the selection process and no other candidate has been selected for the post. Therefore, the selection process has not yet yielded any direct consequences in the Applicant's contract or terms of employment.

16. Accordingly, the UNDT dismissed the application, finding it non-receivable *ratione materiae*.

³ *Gianotti v. Secretary-General of the United Nations*, Order No. 24 (GVA/2021).

⁴ Impugned Judgment, para. 17.

Submissions

Mr. Gianotti's Appeal

17. The Appellant argues the UNDT erred and failed to distinguish his case from the precedents cited in its Judgment. In particular, he points out that the Executive Secretary effectively vetoed his selection on two occasions, after he had been recommended as the sole successful candidate. This action on the part of the Executive Secretary in effect deprived the Appellant of the full and fair consideration that he was entitled to receive. As a result, the action of the Administration yielded direct consequences on his terms of employment.

18. Furthermore, the Appellant says that the instruction of the Executive Secretary on the second occasion to include “at least 1 woman candidate” was in clear violation of the rules and policies as it was in fact directing the Hiring Manager to include in his recommendation: candidates who did not meet the requirements of the post and who failed in the competitive process.

19. The Appellant submits that the rejection of his selection for the P-4 Post and the *de facto* cancellation of the selection process were appealable administrative decisions affecting his terms and conditions of employment. The Appellant therefore requests rescission of the Contested Decision rejecting his candidacy and given that his chances as the *sole* successful candidate were 100 percent, he requests immediate appointment of his promotion with retroactive effect.

The Secretary-General's Answer

20. As a preliminary matter, the Secretary-General first informs the Tribunal that the Job Opening for the P-4 Post was cancelled on 20 May 2021 over concerns regarding the confidentiality and integrity of the selection process. Regarding the merits of the appeal, the Secretary-General argues the UNDT correctly held that the application was not receivable.

21. He also argues that the recruitment process for the P-4 Post was still ongoing at the time and that there had been no final selection yet. As such, the non-approval by the Executive Secretary of the Hiring Manager's recommendation to select the Appellant did not constitute a final decision but was an action taken in an ongoing selection exercise. In the absence of a final selection

decision, the Secretary-General argues the UNDT correctly found that the Contested Decision did not constitute an administrative decision that is subject to judicial review.

22. Additionally, the Secretary-General says the Appellant did not discharge his burden of satisfying the Appeals Tribunal that the Impugned Judgment is defective. The Secretary-General notes the Appellant's appeal brief is a word-for-word repetition of the arguments presented before the UNDT. As such, the Appellant is rearguing his case or requesting the Appeals Tribunal to consider original arguments before the UNDT *de novo* and to come to a different conclusion.

23. The Secretary-General requests the Appeals Tribunal to reject the appeal as the Appellant has failed to identify any error by the UNDT and does not demonstrate any of the grounds for appeal under Article 2(1) of the Appeals Tribunal Statute (Statute).

Additional Evidence

24. On 4 October 2021, the Secretary General was informed by the Executive Office of UNECE that the Appellant had been selected for the P-4 Post. The Secretary-General followed up with the Appeals Tribunal and sought to introduce additional evidence to that effect. Specifically, the evidence consisted of an e-mail from UNECE with an Inspira screenshot showing that Mr. Gianotti was selected for the post. The e-mail dated 4 October 2021 said: "Please be advised that the selection of Mr. Gianotti against Inspira job opening #123535 has been completed now."

25. Additionally, the Secretary-General notes since the Appellant had sought rescission of the Contested Decision and considering his eventual selection, his request for relief has become moot, and as such, the appeal should be dismissed in its entirety.

26. Although the Appellant does not object to the additional information, he says that the information is incomplete. He explains that he was first notified of the cancellation of the job opening on 21 May 2021. He thereafter filed a request for management evaluation regarding the cancellation, and the MEU informed him on 6 October 2021 that the cancellation had been rescinded and that he was selected for the post.

27. The Appellant submits that his appeal is not completely moot and requests: "In view of the time that has been expended thus far and the continuing loss to the Appellant's legitimate career expectations, the Appellant requests rescission of the contested decision rejecting his candidacy

and given that his chances as the sole successful candidate were 100%, he requests immediate implementation of his promotion *with retroactive effect*.”⁵

28. As such, the Appellant seeks the differential in pay for 17 months, from the time the second recommendation was made on 10 June 2020 until his promotion took effect on 1 November 2021. In support, he submits his Statement of Emoluments for the P-4 Post and his Statement of Earnings and Deductions for his then P-3 post to substantiate his claim regarding the pay differential.

29. On 30 November 2021, the Appeals Tribunal granted the Secretary-General’s motion and admitted the additional evidence.

Considerations

30. The issue in this appeal is whether the Dispute Tribunal erred in determining the Appellant’s application was not receivable *ratione materiae*.

31. The Appellant says he is challenging the Executive Secretary’s decision to reject his successful candidacy for the P-4 Post and the decision to continue the recruitment process after one fully qualified candidate had been identified. He argues this was an individual decision with direct impact on his contractual rights and therefore an appealable administrative decision. We disagree.

32. Article 2(1) of the Dispute Tribunal Statute (UNDT Statute) provides, in part:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance[.]

33. The definition of an appealable “administrative decision” was set forth in *Andronov*:⁶

⁵ Comments on Respondent’s Motion, para. 6 (emphasis in original).

⁶ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

There is no dispute as to what an “administrative decision” is. It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

33. Therefore, the key characteristics of an administrative decision subject to judicial review is that the decision must “produce direct legal consequences” affecting a staff member’s terms or conditions of appointment. However, “[w]hat constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision”.⁷ In the Impugned Judgment, the Dispute Tribunal found that the selection process had not yet yielded any direct consequences on the Appellant’s contract or terms of employment. The process was not completed at the time of the Judgment. The Dispute Tribunal found that while the recommendation for the Appellant’s selection was not approved on two separate occasions, there was no evidence that he was rejected from the selection process and his candidacy in fact remained valid. In other words, even though the recommendation to select the Appellant was not approved and even though the selection process continued, the final selection had not yet occurred at the time of the Judgment.

34. Unlike the case in *Ngokeng*,⁸ the selection process was not cancelled and recruitment was ongoing when the Dispute Tribunal decided the application. As indicated above, the Dispute Tribunal held the Appellant was not excluded from the process and a final selection had not been made at that time. Therefore, it follows that the Contested Decision was not a final administrative decision and therefore had no direct legal consequences on the Appellant’s contract of employment. As such, there is no administrative decision that can be rescinded.

⁷ *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058, para. 19.

⁸ *Ngokeng v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-460.

35. In addition, since that time, the final selection has occurred. The Appellant was selected as the successful candidate for the P-4 Post. Therefore, the Appellant has now received that which he had sought, namely being the selected for the post.

36. The Dispute Tribunal did not err when it held that the application was non-receivable *ratione materiae*. We note the role of judicial review by the Appeals Tribunal is clearly set out in Article 2(1) of the Statute, namely to determine if the Dispute Tribunal has made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction. In addition, the appellant has the burden of satisfying the Appeals Tribunal that the judgment rendered by the Dispute Tribunal was defective on these grounds, and it is not sufficient for a party to simply re-try or reargue the case before the Appeals Tribunal because they disagree with the outcome.⁹ This is what the Appellant has done.

37. Nevertheless, the Appellant seeks compensation. Specifically, he seeks the differential in pay for 17 months, which is computed from the time the second recommendation was made on 10 June 2020 until his promotion took effect on 1 November 2021.

38. Article 9(1) of the Statute specifies the remedies available to the Appeals Tribunal:

(a) Rescission of the contested administrative decision or specific performance provided that, where the contested administrative decision concerns appointment, promotion or termination, the Appeals Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph.

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Appeals Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

39. As indicated above, because the Contested Decision is not an appealable administrative decision, a remedy such as rescission or specific performance or compensation for harm pursuant to Article 9 of the Statute is not available to Mr. Gianotti. The Appellant says he has expended time and has lost "legitimate career expectations" but provides insufficient evidence in support, including evidence of what specific career expectations were lost, when, and how.

⁹ See *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051.

40. Therefore, we decline to award the requested relief.

Judgment

41. The appeal is dismissed, and Judgment No. UNDT/2021/013 is upheld.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Sandhu, Presiding
Vancouver, Canada

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

Entered in the Register on this 29th day of April 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar